

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SALVATORE SAMUEL CORTESE,

Defendant-Appellant.

UNPUBLISHED
December 1, 2005

No. 254629
Oakland Circuit Court
LC No. 2003-193078-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of breaking and entering, MCL 750.110, under an aiding and abetting theory. He was sentenced as an habitual offender third offense, MCL 769.11, to serve one to twenty years in prison. This case arises out of an incident in which two men other than defendant broke into a gas station and stole cigarettes. Defendant was discovered in the back of the suspects' van after a high-speed police chase. Defendant now appeals as of right, and we affirm.

Defendant argues on appeal that the trial court erred when it allowed bad acts evidence to be admitted at trial and then denied defendant's motion for a mistrial based on the admission of that evidence. We disagree. In order for the prosecution to introduce evidence of prior bad acts under MRE 404(b),¹ it must meet three criteria. First, the evidence must be offered "under

¹ MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

something other than a character or propensity theory.” *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, it must be relevant. *Id.* Third, its probative value “must not be substantially outweighed by unfair prejudice” *Id.* There is a danger of prejudice if only slightly probative evidence could be given preemptive weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Even if an error is found in the admission of prior bad acts, no reversal is necessary unless the defendant can show that it is more likely than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

This appeal centers on trial testimony by defendant’s mother that her son is a “good person.” When the prosecutor asked defendant’s mother if she wanted “to stand by” that answer, she responded, “Yes,” and reiterated that her “son is a good person.” The prosecutor then asked her if it was true that her son was on probation at the time he was arrested. Defense counsel objected, asserting that he “didn’t open the door” to that line of questioning. Initially, the court told the prosecutor that he “[c]annot create a situation by your examination of the witness.” The prosecutor responded that the testimony was volunteered, not elicited. The court responded, “You’re setting her up though. Go ahead. It’s out now. The jury might as well know it all.”

The prosecution then asked defendant’s mother if it was true that defendant was convicted in 2002 for attempted breaking and entering of a building with intent. Defense counsel again objected, and the jury was removed from the courtroom. Defense counsel argued that while the court had allowed the jury to hear about defendant’s probation, testimony about the conviction underlying the probation could not be heard unless defendant himself testified. The prosecution again countered that he was entitled to impeach defendant’s mothers’ volunteered statement regarding defendant’s good character. The judge responded that she had opened the door to such questioning. The court also denied defense counsel’s motion for a mistrial.

We review a trial court’s decision to admit evidence and its denial of a mistrial for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995); *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497. We see no abuse of discretion in the court’s handling of this matter.

Defendant’s mother testified that her son was a good person. In context, it is clear that the prosecutor’s question that preceded defendant’s mother’s first reference to defendant being a good person was not directed at eliciting a character response. Rather, it was an attempt to have the witness clarify what she was testifying to regarding her knowledge of defendant’s lack of involvement in the crime charged and what was the basis of that knowledge. By putting defendant’s character in issue, defendant’s mother’s response opened the door to the challenged line of questioning. *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997).

Further, we do not believe that the challenged evidence was given preemptive weight by the jury. Deferring to the jury’s better position to assess witness credibility, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), and viewing the evidence in a light most favorable to the prosecution, *Knox*, *supra* at 511 n 3; *Knapp*, *supra* at 378, substantial evidence of defendant’s guilt was presented below. The two men who broke into the gas station testified that defendant had been in the van when the robbery was planned and occurred. While they claimed that he had been asleep and was not involved in any way, two police officers testified that they did not believe defendant was asleep when they came upon him in the suspects’ van shortly after

the break-in and after the suspects had fled the scene at high speed. Indeed, one of the officers testified that defendant had been “pretending” to awaken when discovered. Further, one of the principals in the break-in admitted that he originally told the police that defendant had been awake and aware of the robbery. It is reasonable to conclude that defendant was intentionally feigning being asleep in order to give a false impression about his lack of involvement in the crime.

In sum, the prosecutor introduced the evidence of defendant’s prior bad act not under a propensity theory, but in order to challenge the positive impression of defendant’s character that was given to the jury by his mother. Thus, the trial court did not err in denying defendant’s motion for a mistrial. Regardless, defendant has not shown that the admission of the evidence was outcome determinative.

Affirmed.

/s/ William B. Murphy

/s/ David H. Sawyer

/s/ Patrick M. Meter